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November 19, 1993

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EX PARTE NOTICE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MM Docket No. 92-265
Program Access Proceeding

Dear Mr. Caton:

Pursuant to Section 1.1206(1) of the Commission's rules, please be advised that B. R. Phillips, III, Chief Executive Officer of our client the National Rural Telecommunications Cooperative ("NRTC") and the undersigned met this date with Chairman James H. Quello and staff in connection with NRTC's pending Petition for Reconsideration in the above-captioned proceeding.

Copies of the attached written Ex Parte presentation were distributed during the meeting and formed the basis for our discussion. Two copies of these materials are attached for inclusion into the public record of this proceeding.

Should you have any questions or concerns, please feel free to contact the undersigned.

Sincerely,


John B. Richards

Attachments

cc: The Honorable James H. Quello

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections 12 and 19
of the Cable Television Consumer
Protection and Competition Act of 1992,
Development of Competition and Diversity
in Video Programming Distribution
and Carriage

MM Docket No. 92-265

Ex Parte Presentation
by the National Rural Telecommunications Cooperative

**The USSB/Time Warner/Viacom Exclusivity Arrangement is Prohibited
by the Cable Act and is Contrary to the Public Interest
in Developing a Competitive DBS Marketplace.**

1. The Commission must not allow the cable industry and one DBS operator to control the development of the entire DBS market.
2. There is no public policy benefit for the Commission to prohibit -- in areas not served by cable operators -- only exclusive arrangements involving cable operators.
3. Other program delivery technologies have developed without the "benefit" of exclusives arrangements.
4. The Primestar Consent Decree made no finding "in any shape, manner or form" as to the legality of the USSB/Time Warner/Viacom deal under the Cable Act.

DirecTv/NRTC/USSB

1. In April of 1992, the National Rural Telecommunications Cooperative ("NRTC") entered into a DBS distribution agreement with Hughes Communications Galaxy, Inc. ("HCG")/DirecTv to provide DBS services to rural subscribers, many of whom are located in areas not "hardwired" by cable operators.^{1/} As part of their agreement, HCG is required to obtain certain programming agreements on behalf of NRTC.

2. DirecTv is expected to initiate the first DBS service in the United States in early 1994, providing more than 150 channels of video programming directly to households throughout the United States from an FCC-assigned orbital location of 101° W.L. NRTC will market and distribute approximately 20 channels of video programming to rural subscribers generally unserved by cable.^{2/}

3. USSB also will begin operation of its DBS system from the 101° orbital position in 1994, utilizing a five transponder payload located on one of HCG's satellites. USSB will have the capability to offer approximately 30 channels of video programming to consumers. USSB, Time Warner and Viacom have entered into exclusive arrangements for the distribution of HBO, Showtime and other DBS programming throughout the country.

^{1/} DirecTv and HCG are sister subsidiaries of Hughes Communications, Inc. ("HCI"). HCG has been licensed by the FCC to provide high-powered DBS service. DirecTv is the DBS operating, customer service and programming acquisition arm of the HCI family.

^{2/} Areas unserved by cable under Section 628(c)(2)(C) of the Cable Act (e.g., the area generally to be served by NRTC's DBS service) comprise a significant portion of the country. Currently, the total non-cabled households in the continental United States is somewhere between 14 and 22 million, according to A.C. Nielsen and Warren Publishing.

FCC Program Access Proceeding

4. On April 1, 1993, the Commission adopted its First Report and Order ("Report and Order") in the "Program Access" proceeding.^{3/} The Commission established broad, "technology neutral" rules designed to prohibit discrimination by the cable industry against competing program distribution technologies.

5. As part of its new rules, the Commission prohibited exclusive arrangements by a cable operator that prevent a distributor from obtaining programming for distribution to persons located in areas not served by a cable operator. Exclusive arrangements not involving a cable operator, however, are permissible under the new rules. 47 C.F.R. 76.1002(c)(1).

6. On July 28, 1993, NRTC filed a Petition for Reconsideration concerning this particular aspect of the Report and Order, pointing out that Section 628(c)(2)(C) of the Cable Act does not proscribe only conduct involving cable operators. All "practices, understandings, arrangements, and activities ... that prevent a multichannel video programming distributor from obtaining such programming ... for distribution to persons in areas not served by a cable operator ..." are prohibited, not just those involving "cable operators". 47 U.S.C. 547(c)(2)(C). NRTC argued that the Commission's new rule allowing exclusive arrangements with non-cable operators is contrary to the plain language of the Cable Act, contrary to the text of the Commission's Report and Order, and contrary

^{3/} In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 F.C.C.R 3359 (April 30, 1993).

to the public interest. NRTC urged the Commission to reconsider its rule and to bring it into compliance with the statute.

7. On July 14, 1993, Oppositions to NRTC's Petition for Reconsideration were filed by USSB, Time Warner and Viacom, who by that time had entered into their exclusive DBS programming agreements for both "cabled" and "uncabled" areas. On July 28, 1993, NRTC filed its Reply.

8. In September of 1993, after the date for filing Oppositions to NRTC's Petition for Reconsideration expired, USSB presented written ex parte presentations to various Commission officials. USSB claimed that its exclusive deal with Time Warner and Viacom is beneficial to the public because there must be "competitive exclusivity" for a healthy DBS marketplace. The Cable Act permits such "competitive exclusivity," according to USSB, as evidenced by the fact that Judge Sprizzo sanctioned the USSB/Time Warner/Viacom arrangement in the Primestar Partners case.

9. With less transponder capacity than DirecTv/NRTC, USSB argued that it will suffer competitively if it cannot enter into exclusive programming arrangements with vertically integrated cable programmers. As a result, in USSB's view, it makes "good sense" to allow "competitive exclusivity" within the framework of the DBS industry.

10. NRTC disagrees with USSB regarding both the legality and the desirability from a public policy perspective of exclusivity arrangements with vertically integrated cable programmers for the DBS marketplace. Exclusive arrangements between vertically integrated cable programmers and DBS distributors for areas not served by cable operators

are contrary to the plain language and intent of the Cable Act, as well as the public interest. Exclusive DBS arrangements will not promote the DBS marketplace; they will stifle it. They will not increase competition; they will suppress it. They will make "good sense" only for the beneficiaries of the exclusive arrangements.

1. The Commission must not allow the cable industry and one DBS operator to control the development of the entire DBS market.^{4/}

11. Notwithstanding passage of the Cable Act, DirecTv at this late date has still been unable to reach an agreement with either Time Warner or Viacom to allow DirecTv and NRTC to distribute the two most popular premium services and the most essential examples of multichannel programming: Time Warner's HBO and Viacom's Showtime. Why? Because Time Warner and Viacom entered into exclusive arrangements with USSB.^{5/}

12. The USSB/Time Warner/Viacom exclusivity arrangement will permit the cable MSOs to sell an array of critical programming on an exclusive basis to USSB, thus denying DirecTv/NRTC access to the full menu of key programming they must have to attract subscribers. As DirecTv/NRTC and USSB are the only entities expected to provide DBS

^{4/} See, Joint Amicus Curiae Memorandum of Law of DirecTv, Inc., National Rural Telecommunications Cooperative, Consumer Federation of America and Television Viewers of America, Inc., State of New York, et al v. Primestar Partners L.P., No. 93 Civ. 3868 (JES), July 16, 1993, attached as Attachment C to NRTC's Reply in MM Docket No. 92-265.

^{5/} As the Commission is well aware, much of the most popular multichannel subscription programming is supplied by companies that are vertically integrated with cable MSOs. Historically, these vertically integrated programmers either have been unwilling to deal with alternative MVPD cable competitors, or have done so only at highly discriminatory rates, terms and conditions. See, 1990 Cable Report at 5020.

service in the foreseeable future, the USSB/Time Warner/Viacom exclusive arrangement will permit the cable industry to "split" the DBS market. USSB will have programming, but limited capacity; DirecTV will have the capacity, but limited programming. The cable monopolies will then face only "hobbled" DBS competitors.

13. USSB evidently paid an exclusivity premium for its arrangements with Time Warner and Viacom, who thereby set the baseline price for distribution of HBO, Showtime and their other programming in the DBS market. No other DBS provider can obtain this programming from USSB at a better price, or from Time Warner or Viacom at any price. By definition, this "tilts" the DBS playing field in favor of cable. It makes DBS less effective as a competing technology, because it allows the cable industry to structure the playing field of its competitors. Through the use of these exclusive arrangements, the cable industry will control DBS as a competitive force.

14. The USSB/Time Warner/Viacom exclusivity arrangement places the future of DBS solely in the hands of vertically integrated cable programmers and USSB. Through these exclusive arrangements, USSB is now the "only deal in town" for DBS distribution of HBO, Showtime and the other "exclusive" programming. Should USSB opt for a "low volume/high margin" or "no service/high cost" approach to DBS, the development of the entire DBS market will be handicapped. Without competitive offerings, the DBS market cannot reach its full potential as an alternative delivery technology serving the American public.

15. The success of DBS as a competitive technology must not be dependent on the competitive decisions of huge cable companies and one DBS distributor. To the contrary,

Congress mandated fair access to programming for all competing distributors, so the public would receive the benefits of competition -- not so USSB would receive the benefits of what it calls "competitive exclusivity."

16. NRTC has no more transponder capacity available for its use than does USSB, yet NRTC did not base its business plan on exclusive arrangements with vertically integrated programmers. NRTC plans to offer a wide balance of programming, based upon the concept of Program Access as mandated by the Cable Act. USSB, however, opted for negotiating exclusive arrangements with cable-owned programmers rather than developing a balanced DBS program package of its own.^{6/} Instead of offering a variety of programming alternatives, or the "niche" programming that USSB has touted publicly for years, USSB chose to foreclose competition by entering into exclusive arrangements with Time Warner and Viacom. USSB's approach is contrary to the Cable Act and, if sanctioned by the Commission, would be extremely bad public policy. The DBS industry needs fair access to programming, not exclusive arrangements "blessed" by the cable industry, in order to develop and thrive as a competing technology.^{7/}

^{6/} See, program offerings attached to USSB ex parte filing.

^{7/} Tempo (TCI) is licensed to operate a DBS system at 119° W.L. Once DirecTv/NRTC and USSB have been "neutralized" as a competitive force by the use of exclusive arrangements, Tempo would be free to step-in and dominate the DBS market, just as TCI has dominated cable.

2. **There is no public policy benefit for the Commission to prohibit -- in areas not served by cable operators -- only exclusive arrangements involving cable operators.**

17. In its Petition for Reconsideration, NRTC challenged only the Commission's rule regarding exclusive arrangements in areas unserved by cable. Congress granted the Commission no discretion regarding exclusive arrangements in areas unserved by cable. Congress prohibited all exclusives in unserved areas, regardless of the technology deployed. In areas served by cable, on the other hand, Congress was more lenient. In those areas, Congress permitted the Commission to make a "public interest" finding in authorizing exclusive arrangements in particular cases. Cf., 47 U.S.C. 628(c)(2)(C) (areas unserved by cable), 628(c)(2)(D) (areas served by cable).

18. The language used by Congress in Section 628(c)(2)(C) and 628(c)(2)(D) is different. Subsection (C) prohibits all exclusives in non-cabled areas, including specifically those involving cable operators. Subsection (D), on the other hand, prohibits only exclusives involving cable operators in cabled areas. By using different language, Congress accomplished different results. In bifurcating its approach to "served" and "unserved" areas, Congress afforded additional protection to those Americans who reside in areas unserved by cable.

19. Persons residing in areas unserved by cable typically receive far fewer media choices than those who live in cabled areas. Over-the-air terrestrial television stations, as well as alternative distribution technologies -- MMDS, SMATV, and others -- are more limited in rural, unserved areas. All exclusive arrangements were specifically prohibited by

Congress in these unserved areas. "Competitive exclusivity," although recognized by USSB, was never recognized by Congress as an acceptable excuse for an exclusivity arrangement in an unserved area.

20. In fact, "competitive exclusivity," the phrase created by USSB, is a misnomer. It is an oxymoron. It is not even a statutorily recognized factor for the Commission to consider in determining whether exclusive arrangements should be permitted in areas served by cable under the "public interest" test required by Section 628(c)(2)(D) of the Cable Act. It most certainly is not a legitimate factor in determining whether the USSB/Time Warner/Viacom arrangement is prohibited by the blanket statutory ban, contained in Section 628(c)(2)(C) of the Act, against all types of exclusive arrangements in unserved areas.

21. Program Access under the Cable Act was intended to be "technology neutral." It is inconceivable that Congress intended to prohibit -- in areas unserved by cable -- only exclusive arrangements involving cable operators. These areas, after all, are not served by cable. "Cable operator exclusives" are generally not a problem in unserved areas. Congress did not intend to "fix" a problem that does not exist. Rather, Congress fixed a problem that does exist: exclusive arrangements that prevent an MVPD from obtaining programming in areas not served by a cable operator.

22. It is equally "silly," from a public policy perspective, to prohibit cable operators from entering into exclusive arrangements that block the distribution of programming to competing technologies, but to allow vertically integrated cable programmers (such as Time Warner and Viacom) to do so. Time Warner and Viacom are

cable operators. They own and control cable systems, which is what makes them vertically integrated! There is no bona fide policy reason why vertically integrated cable programmers and cable operators should not both be covered by the Congressional ban against exclusive arrangements in unserved areas.

3. Other program delivery technologies have developed without the "benefit" of exclusive arrangements.

23. Using exclusive arrangements in the TVRO market in the 1980's, HBO and Showtime originally refused to deal with NRTC. Notwithstanding NRTC's offer of an advance purchase of \$1,000,000 each, HBO and Showtime continued to disallow access to their programming services by NRTC as a TVRO distributor. By 1987, however, Congress drew the line. HBO, Showtime and others were forced by Congressional pressure to make their product available to NRTC for TVRO distribution. Today, HBO/Showtime license broadly within the TVRO market and many distributors compete over price and service through creative packaging. TVRO program providers have been able to distinguish their services through various packaging, service and other offerings. This type of competition has led to consumer benefit.

24. While multiple distributors now compete in C-Band, USSB claims that it cannot compete in DBS if Hughes and NRTC have fair access to programming. "Exclusives," however, are not necessary in the DBS market and would be counterproductive from a public interest perspective. USSB is not entitled to receive special treatment.

25. Congressional interest in Program Access must override USSB's interest in blocking competition. In Section 628(c)(2)(C), Congress placed all distributors on a level playing field with respect to accessing cable owned programming services.^{8/} USSB has no right to block DBS competitors through exclusivity arrangements with the cable industry.

4. The Primestar Consent Decree made no finding "in any shape, manner or form" as to the legality of the USSB/Time Warner/Viacom deal under the Cable Act.

26. In its ex parte filing, USSB presented several quotations from the Primestar transcript, claiming that Judge Sprizzo and 40 State Attorneys General supported the USSB/Time Warner/Viacom deal as being consistent with the requirements of the Cable Act.^{9/} Such a representation is a mischaracterization of the Primestar record.

27. Judge Sprizzo entered the Consent Decrees despite, not because of, the Cable Act. The Decrees were approved by the Judge specifically because they had a "savings clause" which made clear that the Decrees did not supersede the requirements of the Cable Act.

28. Relying on the savings clause, Judge Sprizzo could not have been more adamant during the Primestar hearing in emphasizing the limited scope of his decision. He

^{8/} USSB unsuccessfully lobbied on the side of the cable programmers in opposing the Program Access provisions of the Cable Bill. Now these efforts have apparently been "rewarded" by Time Warner and Viacom with exclusivity arrangements.

^{9/} In its own filing in that proceeding, the Commission noted that significant issues had been raised in the Program Access proceeding regarding exclusive contracts under the Cable Act. The Commission expressed its own concerns regarding the proposed Decrees.

was unequivocal in repeatedly warning all parties that his actions should not be construed at the FCC or elsewhere as supporting any particular exclusivity arrangements:

If I approve this decree, I am indicating no opinion whatsoever in any shape, manner or form with respect to whether exclusive contracts do or do not conform with the Cable Act. (Trans., p. 22)

There is nothing in this decree that binds the FCC in any way or binds you in any way, nor should any finding I make in approving this decree be taken in any shape, manner or form as any imprimatur of approval or any suggestion that the particular exclusive contracts are lawful or unlawful. (Trans., p. 23)

If I choose to approve this decree, as I think I will, I am not suggesting in any shape, manner or form that exclusive contracts with orbital providers or the price determinations are lawful. I will say that for the record, so that if they try to use it, you can say Judge Sprizzo has said specifically that, in approving the decree, he is adhering to principles of federalism and therefore allowing the State Attorneys General to decide what they think to be appropriate, without unnecessary judicial interference. (Trans., p. 30)

Whatever I have done in approving this decree is not in any way a finding by this Court that any conduct challenged in the future, either in the Courts or at the FCC in an administrative hearing, is lawful by virtue of the fact that the Court has signed this decree.

29. In light of these direct and unequivocal instructions, it is surprising that USSB would ignore Judge Sprizzo's admonitions and argue that he somehow intended to sanction the USSB/Time Warner/Viacom deal. He did nothing of the sort. In fact, he repeatedly emphasized just the opposite.

CONCLUSION

30. The USSB/Time Warner/Viacom exclusivity arrangement is prohibited by the Cable Act in areas unserved by cable operators and would stifle the development of the DBS market. The Commission must not allow the cable industry and one DBS operator to

control DBS as a competitive force. The DBS industry needs fair access to programming, not exclusive arrangements "blessed" by the cable industry, in order to develop and thrive as a competing technology.

Dated: November 19, 1993